SERVED: May 25, 1994

NTSB Order No. EA-4165

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of May, 1994

MATTHEW CARUSO, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 149-EAJA-SE-12360

OPINION AND ORDER

Applicant has appealed from the initial decision of Administrative Law Judge Jimmy N. Coffman, served January 5, 1993, denying applicant's application for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.[1] For the reasons that follow, we deny the appeal and affirm the denial of fees and expenses.

[1] A copy of the initial decision is attached.

On January 8, 1992, the Administrator issued an order suspending applicant's commercial pilot certificate for 90 days based primarily on allegations that he served as pilot-in-command of numerous flights for compensation or hire operated by National Waste Disposal, Inc. ("NWD") between December 6, 1988, and November 22, 1989, which were allegedly subject to 14 C.F.R. Part 135, when he had not complied with the pilot training and testing requirements of Part 135. It was also alleged that one of the aircraft allegedly flown by applicant on some of those flights had not been properly inspected and, further, was unairworthy in that it did not comply with applicable airworthiness directives (ADs).[2] Applicant apparently maintained throughout the investigation that, although he had admittedly logged pilot-in-command time in his pilot logbook on the flights in question, he had not actually served as pilot-in-command in the sense of being responsible for the overall operation and safety of the flights (see 14 C.F.R. 1.1). Rather, applicant contended, he was entitled to log pilot-in-command flying time simply because he had been the sole manipulator of the aircraft controls during those flights.

The record in this case indicates that, on May 22, 1992, the Administrator advised the law judge's office by telephone that he was withdrawing the complaint in this proceeding. On May 29,

[2] It was alleged that applicant violated the following sections of the Federal Aviation Regulations (14 C.F.R.): 91.9 [now 91.13(a)]; 39.3; 91.29(a) [now 91.7]; 91.169(a)(1) [now 91.409(a)(1)]; 91.169(b) [now 91.409(b)]; 135.3(a); 135.293(a); 135.293(b); 135.297(a); 135.299(a); and 135.343.

1992, the law judge issued an order terminating the proceeding. Subsequent filings revealed that the Administrator had agreed to withdraw the complaint if applicant would execute an affidavit stating that he had flown the aircraft on the flights in question,[3] but that he did not know that the flights were being operated pursuant to Part 135. Applicant thereafter filed an application for attorney fees and expenses pursuant to the EAJA.[4]

The EAJA requires the government to pay to a prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1). To find that the Administrator was substantially justified we must find his position reasonable in fact and law, i.e., that there is a reasonable basis in truth for the facts alleged; that there is a reasonable basis in law for the legal theory propounded; and that the facts alleged will reasonably support the legal theory advanced. McCrary v. Administrator, 5 NTSB 1235, 1238 (1986); U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 2 (1993). Accordingly, substantial justification may be demonstrated even where charges

[3] The record does not contain a copy of the affidavit. We presume, however, that consistent with his stated position applicant admitted only to flying the flights in the sense that he operated the controls of the aircraft, not in the sense of serving as pilot-in-command.

[4] Over the course of this proceeding, applicant has supplemented his original application with three additional requests for fees and expenses. Our denial of an EAJA award in this case extends, of course, to all of the applications and requests filed by applicant.

have been withdrawn or an action has been dismissed. U.S. Jet at 3.

In responding to the application, the Administrator did not dispute that applicant was a "prevailing party" within the meaning of that statute, and the law judge so found. The law judge concluded, however, that the Administrator was substantially justified in pursuing this enforcement action until the time he withdrew the complaint and, accordingly, denied the application for fees and expenses. We agree with the law judge, and affirm his denial of an EAJA award.

On appeal applicant argues, as he did before the law judge, that the Administrator pursued this case in contravention of our stale complaint rule,[5] and that his action therefore lacked a reasonable basis in law. Further, applicant asserts that the alleged violations in the complaint lacked a reasonable basis in fact and law.

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[5] Our stale complaint rule (49 C.F.R. 821.33) provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

> Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:
> (a) In those cases where a complaint does not allege lack of qualification of the certificate holder:
> (1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

I. Stale complaint. The law judge found that the complaint was not stale because applicant received the Administrator's notice of proposed certificate action (NOPCA) on the last day of the six-month period following the approximately one-year period during which the violations allegedly occurred (December 6, 1988 until November 22, 1989). Applicant disputes this finding on two grounds. First, he claims that in using the word "until" in defining the period during which the allegedly violative flights occurred, the Administrator excluded November 22 from that time period. Second, he points out that even if the law judge's inclusion of November 22 in the six-month period was correct, all of the alleged violations occurring prior to November 22 would still be stale. The Administrator asserts that applicant waived any argument he might have had under our stale complaint rule by failing to include it as an affirmative defense in his answer to the complaint.[6] Accordingly, the Administrator contends that the issue is not appropriate for our consideration.

Accepting applicant's premise that all or most of the alleged violations occurred outside of the six-month notice period specified in our stale complaint rule, we still cannot conclude that the Administrator therefore lacked substantial justification for pursuing this case. It must be remembered that

[6] Section 821.31(c) of our Rules of Practice (49 C.F.R. 821.33(c)) states that a respondent's answer "shall also include any affirmative defense that respondent intends to raise at the hearing." The rule further provides that, "[i]n the discretion of the law judge, any affirmative defense not so pleaded may be deemed waived."

the standard of review at the EAJA stage is "separate and distinct from whatever legal standards governed the merits phase of the case." FEC v. Rose, 806 F.2d 1081, 1087.[7] In Rose -- a case where fees were denied despite a ruling in the merits phase that the government's action was "arbitrary and capricious" -- the court made clear that, in evaluating the government's actions at the EAJA stage, the adjudicating authority need only find that it "acted slightly more than reasonably, even though not in compliance with substantive legal standards applied at the merits phase." Id.

Even though applicant received the NOPCA more than six months after most of the alleged violations had occurred, it appears from this record that only four months had passed since the Administrator first became *aware* of applicant's alleged violations. Under Board precedent, the Administrator can avoid dismissal of facially stale charges in cases where his discovery of the alleged violations was non-contemporaneous. See e.g. Administrator v. Platt, NTSB Order No. EA-4012 at 5 (1993) (respondent received the notice some four months after Administrator's delayed discovery of alleged violations at issue). According to the Administrator's undisputed description of events here, the investigation into applicant's alleged violations grew out of information discovered in a larger investigation into unlawful Part 135 flights operated by National

[7] See also U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 3 ("EAJA's substantial justification test is less demanding than a party's burden of proof").

Waste Disposal, Inc. (NWD), which was triggered by a crash on December 15, 1989. Subsequently, in response to a request from the FAA, applicant produced his pilot logbook for inspection on January 15, 1990. Thus, it appears from this record that the earliest the Administrator could have known of applicant's alleged violations was January 15, 1990, approximately four months prior to applicant's receipt of the NOPCA. We believe the issuance of the NOPCA four months after discovery of the alleged violations establishes that the Administrator acted with reasonable basis in fact and law, at least within the meaning of the standard discussed in Rose and U.S. Jet, in prosecuting the matter.[8]

II. Substantial justification for allegations in the complaint.

The bulk of the allegations in this case involved applicant's piloting of numerous flights which were allegedly subject to Part 135, when he had not complied with the pilot training and testing requirements of that Part. In addition, applicant was also charged with operating an aircraft which lacked required maintenance and inspections, and was unairworthy. As discussed below, notwithstanding applicant's proffered explanations as to the nature of his role on those flights, we agree with the law judge that a reasonable basis existed in both fact and law for

[8] This is not to say that the Administrator would have prevailed at hearing on this issue, as precedent such as Platt requires a showing of reasonable dispatch after discovery of the alleged violations. But the standard of review at the EAJA stage does not require the certainty of a favorable outcome, only a reasonable basis for proceeding.

pursuing these alleged violations.

Part 135 violations. There appears to be no dispute that the operator of the flights at issue, NWD, was found by the FAA to have engaged in widespread violations of Part 135 during 1988 and 1989 by operating flights for compensation or hire without possessing an appropriate operating certificate, as well as some aircraft maintenance and inspection violations. That investigation further indicated that applicant was one of the individuals who had piloted some of the unlawful NWD flights. Indeed, applicant's pilot logbook seemed to confirm that finding, in that it showed he had logged pilot-in-command flying time on the flights in question.

As noted above, applicant claimed throughout the investigation that he was never employed by NWD, and had not served as pilot-in-command in the sense that he was responsible for the operation and safety of the aircraft during flight time; and that, in any event, he believed that the flights were operated under Part 91,[9] not Part 135. However, he submitted no evidence to substantiate his claims. The Administrator asserts, and we agree, that he was not obligated to accept the truth of

[9] Specifically, applicant claims he believed the flights were authorized by Exemption No. 1637, issued to the National Business Aircraft Association on September 26, 1984. This document grants an exemption from 14 C.F.R. 91.169(f) [now 91.409(f)] and 91.181(a) [now 91.501(a)], to the extent necessary to allow the NBAA to operate small aircraft and helicopters under the operating rules of sections 91.183 through 91.215 [now 91.503 through 91.533], and the aircraft inspection rules of 91.169(f) [now 91.409(f)]. The Administrator disputes the applicability of this exemption to the flights at issue in this case.

applicant's statements out of hand. Inasmuch as the issues of whether applicant was the pilot-in-command, and whether he knew or should have known that the flights were governed by Part 135,[10] hinged on applicant's credibility on those matters, we think the Administrator would have been substantially justified -- absent some additional dispositive evidence -- in proceeding to a hearing where credibility judgments could have been made on those critical issues.

Airworthiness and aircraft inspection violations. Applicant asserts that the Administrator's position on the alleged violations of 14 C.F.R. 39.3 (operation contrary to the requirements of an AD), 91.29 [now. 91.7] (operation of an unairworthy aircraft), and 91.169 [now 91.409] (requirements for annual and 100-hour inspections), lacked a reasonable basis in law. Specifically, applicant claims that: he was not aware of the AD non-compliance and such awareness is a pre-requisite to a section 39.3 violation; only the pilot-in-command is chargeable with a section 91.29 violation and he was not the pilot-in-command; and, except for one case which applicant claims is dissimilar to this one, violations of section 91.169 have only been affirmed against owners of the aircraft involved.

Whether applicant was aware of the AD non-compliance, and whether he was pilot-in-command of the flights at issue were --

[10] We have declined to hold pilots responsible for Part 135 violations when they neither knew nor should have known that the flights they operated were governed by Part 135. Administrator v. Garnto, 3 NTSB 4119 (1981); Administrator v. Fulop, NTSB Order No. EA-2730 (1988).

at least until applicant executed his affidavit -- unresolved credibility issues. Accordingly, the Administrator did not lack a reasonable basis for pursuing the section 39.3 and 91.29 charges. As for the section 91.169 charges, in light of the reasonableness of all of the remaining charges in the complaint, we think it is unnecessary to reach a final determination in this proceeding as to whether these charges were properly brought against applicant. Even if we were to assume that those charges lacked a reasonable basis in law, that would not detract from the overall reasonableness of the Administrator's pursuit of this action to the point at which he withdrew the complaint.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. The law judge's denial of attorney fees and expenses is affirmed.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.